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NO. 317

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM ESTEP, *Petitioner*

VS.

UNITED STATES OF AMERICA, *Respondent*

No. 15048, In The United States Court of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX
BODY OF PETITION FOR WRIT

	Page
Petition For Writ	1
Statement of Case	2- 3
Jurisdictional Statement	3
Reasons urged why Writ should be granted	4- 5
Questions Presented for Review	5- 7
Constitutional Provisions Involved	7
Statutes Involved	7- 9
Rules of Court Involved	9
Statement of Facts in Case Believed Material to Consideration of Questions Presented	9-16
Jurisdiction of Court of First Instance	16-17
Amplifications of Reasons for Writ	17-22
Conclusions	23
Proof of Service	23

APPENDICES

Appendix A (Final Judgment)	24
Appendix B (Opinion of Court Below)	25-33
Appendix C (Judgment Affirming Case)	34
Appendix D (Stay of Mandate)	35

INDEX OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

	Page
Amendment IV to Constitution of United States	7
Amendment V to the Constitution of United States	7

STATUTES INVOLVED

Section 1254, Title 28 U.S.C. (Jurisdiction)	9
Section 1341, Title 18 U.S.C. (Mail Fraud)	7, 16
Section 77e(a), (1) and (2), Title 15 U.S.C. (Secureties and Exchange Act)	7, 16
Section 77q(a) (a) (1), (2) and (3), of Title 15 U.S.C. (Secureties and Exchange Act)	8, 9, 17

RULES OF COURT

Rule 30 of Federal Rules of Criminal Procedure	5, 9

AUTHORITIES CITED

Bollenbach vs. U. S., 66 S. Ct. 403, 326 U.S. 607, 96 L. Ed. 288	4, 18
Congelosi vs. U.S., 19 F. (2) 661	4, 18
Crain vs. U.S., 148 F. (2) 615	22
Daur vs. U.S., 189 F (2) 343	4, 19
Flemming vs. Montgomery Ward, 114 F (2) 384; Cert denied 61 S. Ct. 71, 311 U.S. 690, 85 L. Ed. 446	21

AUTHORITIES—Continued

	Page
Freeman vs. U.S., 96 F (2) 350	18
Kann vs. U.S., 329 U.S. 88, 65 S. Ct. 148	22
Dr. J. H. McLean Medician Co. vs. U.S. 253 Fed.	18
Miller vs. U.S., 317 U.S. 191, 87 L. Ed. 179	22
Morrisetti vs. U.S., 72 S. Ct. 240, 342 U.S. 246 96 L. Ed. 288	4, 19
Paglea vs. U.S., 190 F (2) 445	22
Patterson vs. U.S., 183 F (2) 687	19
Pine vs. U.S., 123 F (2) 825	22
Reeves vs. Howe, 33 Fed. Sup. 619	21
Samuel vs. U.S., 169 F (2) 787	4, 18
Thomas vs. U.S., 151 F (2) 183	4, 18
U.S. vs. Haupt, 136 F (2) 661	4,18
U.S. vs. Link, 202 F (2) 592	4, 19
Wardlaw vs. U.S. 203 F (2) 884	19

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

William Estep, hereinafter referred to as Petitioner, Prays that Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review a final judgment of conviction, dated July 15th, 1955, hereto brought forth and attached hereto as Appendix A, which said judgment of final conviction, affirmed a conviction and sentence imposed upon him in the District Court of the United States for the Northern District of Texas, for

having used the United States Mails in furtherance of a scheme to defraud, and for having violated certain provisions of the Securities and Exchange Act of 1933, and amendments thereto (R. 12-14), and would show to this Honorable Court:

STATEMENT OF THE CASE

Petitioner was convicted in District Court of the United States for the Northern District of Texas, Abilene Division, April 16th, 1954 (R. 12-14) upon an indictment returned against him in that Court with having devised a scheme and artifice to defraud, and having used the United States Mails in furtherance thereof, and with having violated certain provisions of the Securities and Exchange Act of 1933 and amendments thereto (R. 1-11), and was sentenced by the Court to serve Five Years in a penal Institution of the United States, and to pay a fine of Two Thousand Dollars (R. 12-14). The District Court of the United States, Northern District of Texas, thereby had jurisdiction in the first instance.

From this judgment and sentence, Petitioner seasonably appealed to the United States Court of Appeals for the Fifth Circuit (R. 26-27), and on June 8th, 1955, the United States Court of Appeals for the Fifth Circuit rendered judgment affirming the conviction below (R. 893), hereto attached as Appendix B.

The United States Court of Appeals for the Fifth Circuit wrote an opinion in affirming the case (R. 885-892),

which has not been reported, but copy is attached hereto as Appendix C. Petitioner seasonably, towit, on June 27th, 1955, filed his petition for rehearing (R. 894-901), and on July 15th, 1955, the Court of Appeals entered its judgment denying his petition for rehearing (R. 902, and Appendix A), and wrote no opinion. Thereupon, and, towit, on the 22nd Day of July, A.D., 1955, Petitioner filed his petition for a stay of mandate for thirty days from the date of final judgment (R. 903-904). On July 25th, 1955, Honorable Joseph C. Hutcheson, Chief Judge of the United States Court of Appeals for the Fifth Circuit, entered an order staying mandate for a period of thirty days from July 15th, A.D., 1955, in order that Petitioner might apply to this Honorable Court for Writ of Certiorari (R. 905).

JURISDICTION

Jurisdiction of this Honorable Court is sought under and by virtue of the provisions of section 1254 (1) of Title 28 U.S.C.A. Petitioner was indicted and convicted in the District Court of the United States for the Northern District of Texas; he seasonably appealed to the United States Court of Appeals for the Fifth Circuit; his case was affirmed; he applied for rehearing, which was denied; he sought and obtained judgment for stay of mandate for 30 days from July 15th, 1955, in order that he might apply to this Honorable Court for writ of certiorari, more fully set out above.

REASONS URGED WHY WRIT SHOULD BE GRANTED

1. In affirming the action of the trial court in giving to the jury Government's Specially requested charges No. 3 and 4 (R. 17-19) the United States Court of Appeals for the Fifth Circuit rendered a decision in conflict with decisions of other courts of appeals on the same matter, and particularly in conflict with the decisions of the United States Court of Appeals for the 3rd Circuit in *United States Vs Link*, 202 Fed (2) 592; of the United States Court of Appeals for the Sixth Circuit in *Thomas Vs United States*, 151 Fed (2) 183; in *Congelosi Vs United States*, 19 Fed (2) 923; the United States Court of Appeals for the Seventh Circuit in *United States Vs Haupt*, 136 Fed (2) 661; of the United States Court of Appeals for the Ninth Circuit in *Samuel Vs United States*, 169 Fed (2) 787; and in direct conflict with the decision of the United States Court of Appeals for the Tenth Circuit in *Daur Vs United States*, 189 Fed (2) 343.

2. In affirming the actions of the trial court in giving to the jury Government's specially requested charges No. 3 and 4, the United States Court of Appeals for the Fifth Circuit decided a federal question in a way in conflict with applicable decisions of this Honorable Court, and particularly in conflict with the decisions of this Honorable Court in *Bollenbach Vs United States*, 66 S. Ct. 403, 326 U.S. 607, 90 L. Ed. 350; and in *Morissett Vs United States*, 72 S. Ct. 240, 342 U.S. 246, 96 L. Ed. 288.

3. In holding that Petitioner's objections and reasons stated why the trial court should not have given the Government's Specially requested Charges Nos 3 and 4 were not sufficient to apprise the trial court of the error urged (R. 889-892), the United States Court of Appeals for the Fifth Circuit decided an important question of Federal Law which has not been, but should be, settled by this Honorable Court.

4. In holding Petitioner's objection to the action of the trial court in giving to the jury Government's Specially requested charge Nos. 3 and 4 and grounds urged, were insufficient under Rule 30 of Federal Rules of Criminal Procedure (R. 889-892) the United States Court of Appeals for the Fifth Circuit placed an undue burden upon counsel for Petitioner this Honorable Court never intended by the adoption of said Rule 30 of Federal Rules of Criminal Procedure, and, thereby, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Fifth Circuit commit error of such substantial nature as to require the granting of writ of certiorari in sustaining the action of the trial court in giving to the jury Government's Specially requested Charge No. 3?

2. Did the United States Court of Appeals for the Fifth Circuit commit error of such a nature as to require the granting of writ of certiorari is sustaining the trial court in its action allowing the Government to introduce in evidence books, papers and records of Petitioner he alleges were seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States?

3. Did the United States Court of Appeals for the Fifth Circuit commit error of such nature as to require the granting of this writ in sustaining the action of the court below in refusing to grant Petitioner's motion for a judgment of acquittal, seasonably made when the Government rested its case, and renewed when both sides closed?

4. Did the United States Court of Appeals commit error of such harmful nature as to require the granting of this writ when it sustained the action of the trial court in giving to the jury Government's Specially requested Charge No. 4, as follows:

> "False representations, if any, can not be justified by a belief that profits will eventually be realized by persons induced to purchase the stock. No amount of honest belief that a corporate enterprise will ultimately make money for stockholders will excuse false representations or concealment of material facts to obtain money for such enterprise."

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Appropriate provisions of Amendment V of the Constitution of the United States provides:

> "No person shall * * * be compelled in any criminal case to be a witness against himself, * * *"

STATUTES INVOLVED

Section 1341, Title 18 U.S.C.A. provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice, or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or take or receive there-

from, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00, or imprisioned not more than five years or both."

Section 77e(a) (1) and (2) of Title 15, U.S.C.A. provides:

"(a) Unless registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

"(1) to make use of means or instruments or transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

"(2) to carry or cause to be carried through the mails, or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

Section 77q(a) of Title 15 U.S.C.A. provides:

"(a) It shall be unlawful for any person in the sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission

to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Section 1254 of Title 28 U.S.C.A. provides:

"Cases in the courts of appeal may be reviewel by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *."

RULES OF COURT INVOLVED

Rule 30 of Federal Rules of Criminal Procedure provides:

"* * * No party may assign as error the giving or failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matters to which he objects and the grounds of his objection."

STATEMENT OF FACTS IN CASE BELIEVED MATERIAL TO CONSIDERATION OF QUESTIONS PRESENTED

1. Under questions Nos. 1 and 4:

At the request of the Government, the trial court submitted to the jury its Specially requested charge No. 3, here quoted verbatum:

"It is not essential that the Government show by the required degree of proof that all alleged false and fraudulent representations, pretenses and promises made by the defendant were false or that all of the alleged false representations, pretenses and promises specifically charged in the indictment were in fact made by the defendant. It is enough if the Government establish by the required degree of proof that the defendant devised a scheme or artifice to defraud and made one false representation or promise or omitted to state one material fact which you may find necessary to have been disclosed in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and all in furtherance of the scheme to defraud.

"You are further charged that it is not essential that the Government show by the required degree of proof that all the investors in the capital stock of Atomotor Manufacturing Company, Inc. were defrauded, if any you so find, but it is sufficient if you so find that any one or more of such investors were defrauded."

GOVERMENT'S SPECIALLY REQUESTED CHARGE NO. 4

"False representations, if any, can not be justified by a belief that profits will eventually be realized by persons induced to purchase stock. No amount of honest belief that a corporate enterprise will ultimately make money for stockholders will excuse false representations or concealment of material facts to obtain money for such enterprise."

When the trial court completed the reading of his charge to the jury, he called upon counsel for objections to the charge. After counsel for the Government had finished and counsel for the Petitioner were called upon, the following colloquy was had.

Mr. Dailey:

If the court please, to the court's main charge, connected with our special charge, we have no exception, we think it is highly satisfactorily, but we do think - I believe it is Government's Requested Charge No. 3, which goes on and states, that it is not necessary to prove everybody defrauded. We say it is immaterial whether anybody is defrauded or not. And that has no application here.

We except to the charge No. 3 and No. 4, if I may have those charges there.

The Court:

Well, since you each except to 3, perhaps the Court might withdraw it from the Jury.

Mr. Floore:

No, sir, as to 3, it is merely a slip of the tongue there, we think that 3 should be given.

Mr. Dailey:

We do not think that 3 should be given at all. It goes on here, and says it is not essential that the Government show by the required degree of proof that all of the alleg-

ed false and fraudulent representations, pretenses, and promises made by the Defendant were false or that all of the alleged false and fraudulent representations, pretenses, and promises specifically charged in the indictment were in fact made by the Defendant. It is enough if the Government established—now, this, is what we object to — it is enough that the Government establishes by the required proof, degree of proof, that the Defendant devised a scheme and artifice to defraud and made one false representation or promise or omitted to state one material fact which you may find necessary to have disclosed in order to make the statements made in the light of the circumstances under which they were made not misleading, and a furtherance of the scheme to defraud.

We say that is ambiguous, calculated to mislead the Jury, it is not the law governing the case.

And, you further charge that it is not essential that the Government show by any degree of proof that all of the investors in the capital stock of Atomotor Manufacturing Company, Inc., were defrauded, if any you so find, but it is sufficient if you so find that any one or more.

We say it is immaterial whether anybody was defrauded or not, that it would be immaterial, that they had all made plenty of money out of it.

The Court:

The charge is one that is often and usually given where there are overt acts alleged, but inasmuch as this indict-

ment contains no conspiracy count, *I am in doubt about the giving* of the charge.

Mr. Dailey:

We think, Your Honor, it difinitely should not be given because it is immaterial if the scheme and device had not succeeded, it is immaterial as to whether or not anybody were defrauded.

Now, we think No. 4 doesn't go far enough. I think I know the case that you refer to there, it says, false representations, if any, cannot be justified by belief that profits will eventually be realized by persons induced to purchase this stock. No amount of honest belief that a corporate enterprise will ultimately make money for stockholders will excuse false representations.

We say, Your Honor, that that is immaterial there, whether it would make, the same objections urged, but this is misleading and calculated to mislead the Jury into the belief that if Estep did not believe they would make big money alone, why, that would be no defense.

And while I am on my feet, Mr. Floore objects to our charge on the last two counts, that does refer, the exemption simply says it must be sold to people residing in one state. Our special charge, as you will see, goes on to say, that a man cannot slip in here, you know, and not let me know he doesn't live here, and if I do something, if I sell him some stock, and then come back to you, I have

got you, I don't live at Abilene, you sold me in Abilene all right, I was here. There is no evidence that these people ever talked to Mr. Estep. As a matter of fact, they talked to somebody else.

Mr. Hughes:

Mrs. Lumpkins, then, came right here to Abilene.

Mr. Dailey:

Yes, sir, the transaction was had through Mrs. Lumpkins, and we say that offense must be wilfully and knowingly, this set out in the indictment. There is no evidence, and certainly there couldn't be any that Dr. Estep ever knew that this woman lived anywhere else but Abilene, and that is exactly the charge we prepared and the charge the Court gave. It must be wilfully and knowingly done.

The Court:

All right.

Mr. Floore:

As to the third requested charge, a scheme to defraud is almost identical in elements with the conspiracy, that is, the various overt acts, and so forth. Now, as authority for that, we can cite you quite readily *Timber versus United States*, Fifth Circuit Court, we can get readily.

The Court:

Speaking off the record, you look for it to be on your head then?

Mr. Floore:

Yes, sir.

The Court:

The Defendant would like a point to appeal on.

Mr. Dailey:

Note our exception.

UNDER QUESTION NO. 2

When Victor Petznick, a witness called by the Government, testified he had theretofore been duly elected, and had entered upon the duties as secretary Atomotors Manufacturing Company; that he later "broke" with the Corporation and its members, and ceased to be its secretary; that he had received notice to return all the books and records that had come into his possession in his official capacity of secretary of the corporation, but instead of doing so, he delivered them to agents of the Government. Appellant objected to the use of these books and records against him, or any evidence gained by the Government by reason of their possession thereof, because they were seized by the Government, and being used, in violation of the Fourth and Fifth Amendments to the Constitution of the United States, which the trial court overruled and allowed the Government to introduce them in evidence.

UNDER QUESTION 3

When the Government rested its case, and seasonably renewed when both sides closed (R. 668 and R. 781) petitioner moved for a judgment of acquittal, on the grounds the evidence was wholly insufficient to warrant a conviction, which the trial court overruled. The evidence is undisputed that the Atomotor Manufacturing Company, Inc., was conceived in the minds of appellant and his few friends in Abilene, Texas, San Antonio, Texas, and El Paso, Texas. The stock was sold by meetings of of these people on the very spot of these meetings by subscription there pledged and paid without any thought or contemplation of the use of the mails, and the mails, in fact, were never used in the furtherance of the scheme, even if it had been a hoax and fraud (R. 51-54; 58-61; 65-71; 90-91; 97; 108; 113-115; 129-131; 153-154; 146-166; 169; 176-184; 203; 208; 711-214; 256-268; 283-300; 311-312; 316-318; 327; 377; 390; 401; 410; 705; 736-741; 756; 765-766 and 728).

JURISDICTION OF THE COURT OF FIRST INSTANCE

The District Court of the United States for the Northern District of Texas, Abilene Division, had jurisdiction of this case. Petitioner was charged by indictment (R. 1-11), duly returned into said Court and Division thereof for having violated Sec. 1341 of Title 18, U.S.C.A., Sec.

17(a) of the Securities Act of 1933, as amended; 15 U.S.C.A., Sec. 77q(a), Sec. 5(a) of Securities Act of 1933 as amended, and 15 U.S.C.A. Sec. 77e(a), all Federal Offenses alleged to have been committed in Abilene, Texas, being the Abilene Division of the District Court of the United States for the Northern District of Texas.

AMPLIFICATION OF REASONS FOR WRIT UNDER QUESTIONS I AND 4

When the trial court had finished the delivery of his charge to the jury, and called on counsel for the Government and for Petitioner for objections and exceptions, counsel for petitioner objected and excepted to the court's action in giving to the jury Government's Specially requested charges Nos. One and Four (R. 800-804), more fully set out above.

Although the court may give the correct application of the law in its main charge, the giving of the Government's Specially requested charges 3 and 4 amounted to the withdrawal of the correct charge theretofore given, and was calculated to lead the jury to believe that, regardless of intent, if they found that anyone of the stockholders had lost money in this venture, it was their duty to convict.

Appellant earnestly urges the giving of these charges was error of such prejudicial nature as to require the reversal of this case, and urges as follows:

Charge should not be misleading—*Bollenbash vs. U.S.*, 66 S. Ct. 403,326 U.S., 607, 90 L. Ed. 350; *Freeman vs. U.S.* (5 Cir). 96 F. (2), 350.

A Charge of the Court should not be ambiguous—*Thomas vs. U.S.*, 151 F (2) 183.

An erroneous Charge may not be cured by looking at the charge as a whole—*U.S. vs. Haupt*, 136 F (2) 661.

Charge must not be confusing—*Congelosi vs. United States*, 19 F (2) 923.

> "Through a portion of the charge stated the correct rule, error in another portion was not cured, where the jury were left free to follow the erroneous charge, and there was no attempt to correct it. Dr. J. H. McLean Medican Company vs. U. S., 253 Fed 694."

> "Circuit Court of Appeals was not at liberty to assume that erroneous instruction was favorable to appellants and was therefore nonprejudicial. Samuel vs. U. S., (Cal) 169 F (2) 787."

Where a specific intent, such as in a mail fraud case, is a necessary element the trial court must specifically charge that unless such intent to defraud is proven beyond a reasonable doubt they must acquit. A charge, such as the Government's Specially requested charge No. 3, given by the court, is calculated to lead the jury to believe they must convict, even without such intent, where they found some one or more persons had been defrauded and lost money in the venture.

"Where intent of accused is an ingredient of crime charged, its existent is a question of fact which must be submitted to jury, and the trial court may not withdraw or prejudice the issue by instruction that the law raises a presumption of intent from an act. Morissett vs. United States, 72 S. Ct., 240, 342 U.S., 246, 96 L. Ed. 288."

See also *Warlaw vs. United States*, 203 F (2), 884; *U.S. vs. Link*, 202 F (2), 592; *Daur vs. U.S.*, 189 F (2), 343, (5 Cir).

"When jury is given two instructions, one erroneous and prejudicial, and the other correct, giving of such instructions is reversable error. Patterson vs. United States (5 Cir), 183 F(2) 687."

UNDER QUESTION 2

When an officer and/or official of a corporation receives the books and records of such corporation in due course, after he ceases to be acting in such capacity, and becomes hostile to all the other officers, directors and stockholders of such corporation, and becomes an agent of the Government in the prosecution of the members of such corporation, has no right to deliver them to government agents to be used in the prosecution of such other members, officers, and stockholders, and such records' use in such prosecution is in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

After Victor Petznick, a witness called by the Government, had testified that he had been elected to and entered

upon the duties as secretary of Atomotors Manufacturing Co., Inc. and had, in due course, come into possession of certain books and records of the company, but had thereafter "turned against" petitioner and other members of the corporation, and become an agent of the prosecution, had refused to return such records to the rightful agent of the corporation, when called upon so to do, instead of returning such books and records as directed, turns them over to agents of the Government, their use in the prosecution of petitioner was in violation of the Fourth and Fifth Amendments to the Constitution of the United States (R. 126-161).

He testified (R. Supra), that he was duly elected Secretary of the corporation; that he received all the books, records and papers of the corporation; that he thereafter "broke" with the officers and stockholders, and was asked to return these records to the corporation. Instead of doing so, he delivered them to the agents of the Government. When the Government offered these records, and evidence it had gained by reason of their possession thereof, petitioner duly objected to such use, because such records and documents had been obtained in violation of the Fourth Amendment to the Constitution of the United States, and their use against petitioner would be in violation of the Fifth Amendment to the Constitution of the United States, and the trial court overruled the objection, to which petitioner duly excepted (R. 132-140).

Fleming vs. Montgomery Ward & Co., 114 F (2), 384, Cert. Denied, 61 S.Ct. 71, 311 U. S. 690, 85 L. Ed. 446;

Reeve vs. Howe, 33 Fed Sup 619.

Petitioner says that the facts here are different than had these books and records been seized under lawful process from the corporation, or a member of the corporation. The Witness, Victor Petznick, was no longer an officer or legal custodian of these records. In fact, he was an enemy of Petitioner, and kept them after he had been duly requested to return them. Instead of doing so, he delivered them to Government agents.

UNDER QUESTION NO. 3

The evidence shows conclusively that if the mails were used in this case their use was incidental to the operation of the corporation, and not in furtherance of any scheme to defraud, if any. The evidence shows that this little corporation was formed by friends and associates of Petitioner, and money to finance the deal was raised in private meetings, and not by fraudulent use of the mails.

When the Government rested its case, and seasonably renewed when both sides closed (R. 668 and R. 781) petitioner moved for a judgment of acquittal, on the grounds the evidence was wholly insufficient to warrant a conviction. The evidence is undisputed that the Atomotor Manufacturing Company, Inc., with a capital stock of $25,000

00, organized under the laws of the State of Texas, was conceived in the minds of appellant and his few friends in Abilene, Texas, San Antonio, Texas, and El Paso, Texas. The stock was sold by meetings of these people on the very spot of these meetings by subscription there pledged and paid without any thought or contemplation of the use of the mails, and the mails, in fact, were never used in the furtherance of the scheme, even if it had been a hoax and fraud (R. 51-54; 58-61; 65-71; 90-91; 97; 108; 113-115; 129-131; 153-154; 146-166; 169; 176-184; 203; 208; 711-214; 256-268; 283-300; 311-312; 316-318; 327; 377; 390; 401; 410; 705; 736-741; 756; 765-766 and 728).

Failure of the trial court to sustain Petitioner's motion for a judgment of acquittal, he urges, was error of such prejudicial nature as to require a reversal of this case, and particularly calls this Honorable Court's attention to the following authorities:

Crain vs. United States, (5 Cir) 148 F (2), 615;

Paglia vs. United States, 190 F (2) 445 (2 Cir);

Pine vs. United States, 123 F (2) 825, 829;

Kann vs. United States, 329 U.S. 88, 65 S. Ct. 148;

Miller vs. United States, 317 U.S. 191, 87 L. Ed. 179.

CONCLUSION

Petitioner earnestly urges this Honorable Court grant Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and for such other and further orders and relief that, in the premises, may be just and proper.

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.....

HOWARD DAILEY, Davis Bldg.
Dallas, Texas,
Of Counsel

I, Robert H. Hughes, Counsel for Petitioner, William Estep, and admitted to practice before the Supreme Court of the United States, and now in good standing before that Tribunal, certify I have, on this the 11 Day of August, 1955, deposited two copies of this Petition, including all appendices attached, to the Honorable Simon E. Sobeloff, Solicitor General of the United States, addressed to his Office in the Department of Justice Building, Washington, D.C., in the Post Office, Dallas, Texas, with adequate Air Mail Postage prepaid.

.....

Robert H. Hughes, Davis Building,
Dallas, Texas, Counsel for Petitioner.

APPENDIX A

ORDER DENYING REHEARING

Extract from the Minutes of July 15, 1955.

NO. 15048

WILLIAM ESTEP

VERSUS

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

APPENDIX B

OPINION OF THE COURT - FILED JUNE 8, 1955.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 15048

WILLIAM ESTEP, *Appellant*

VERSUS

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Northern District of Texas.

(June 8, 1955.)

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before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

HUTCHESON, Chief Judge: Tried and convicted on nine counts of a ten count indictment, charging in four of them violations of the Mail Fraud Statute, 18 U.S.C., Sec. 1341, and, in five, of the Securities Act, as amended, 15

U.S.C., Sec. 77(e)(a) (1) and (2) and (q) (a), and sentenced to imprisonment for five years and to pay a fine of $2000, defendant has appealed.

Putting forward four specifications of error,[1] appellant is here insisting that the judgment of conviction may not stand. For the reasons hereafter set forth as to each, we are of the clear opinion that none of the specifications are meritorious and that the judgment must be affirmed.

While the record is lengthy, not because of the multitude of issues but because of the number of witnesses offered in support of them, the case, in its essence, is quite a simple one. The scheme to defraud, alleged in the indictment and testified to at the trial by witnesses for the government, related to the sale of the capital stock of Atomotor Manufacturing Company, Inc., which was represented as being about to market a fuelless, self energizing motor. A number of representations, alleged to have been made to induce persons to purchase stock subscriptions, were testified to by a number of witnesses who had purchased the stock, and there was abundant evidence to take to the jury the question of whether the representations were false and whether the scheme was one to defraud.

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1. These are: (1) The use of the corporation books in evidence over the defendant's objection, that they were seized by the government, and being used, in violation of the Fourth and Fifth Amendments to the Constitution; (2) The denial of defendant's motion for acquittal; (3) The denial of appellant's motion to remand the cause to the trial court to prefect the record; and (4) The giving at the request of the government of special charges 3 and 4.

Among the matters testified to were: that qualified engineers had told defendant that the motor could not possibly work; that a patent attorney, whom he had consulted about the patentability of the claim for the motor, had told him that the claim for it was in effect a claim of perpetual motion, and that no patent could be obtained thereon; that defendant had oversold the authorized capital stock of the corporation; and that he had used for his own personal use some of the money obtained from the sale of stock, though he had stated that all of the money from the sale of the stock would be used to finance the motor. It was also proved that appellant had used the mails as alleged in the indictment.

The defendant did not testify, nor did he offer any evidence in rebuttal of testimony, that he had been told that the motor could not possibly work and that it was unpatentable, that it was in effect a scheme for perpetual motion, which schemes everyone knew were impossible. There was further evidence, not disputed by any testimony offered by him, that his claims to knowledge of, or expertness in, the field of atomic energy were completely without foundation.

When appellant's claims of error are considered against this background and the controlling rule of law, that where a sentence on many counts does not exceed the sentence which could be properly imposed on one of them as to which there was no error, the sentence will not be disturbed, even though there might be error in connection

with one or more counts, it is plain that the attack upon the judgment is insubstantial.

It is quite clear that the first ground of error, of the use in evidence of the books of the corporation, is without substance. The books and records were not the property of defendant, nor were they kept by him or in his possession. Further, no surch or seizure was involved in obtaining them. On the contrary, they were voluntarily delivered to the government by the person then in possession of them. *Wilson v. United States*, 221 U.S. 361; *Verdeau v. McDowell*, 256 U.S. 465. Cf. *Fleming v. Montgomery Ward*, 114 F (2) 384, cited by appellant.

Under his second ground of error, the denial of his motion for acquittal, defendant does not, indeed could not, claim that there was no testimony sufficient to take to the jury whether or not he had devised a scheme to defraud. The grounds of the motion were: that the evidence fails to show the use of the mails in furtherance of the alleged scheme to defraud charged in the mail fraud counts; and that, as to counts 6 to 10, charging violation of the Securities and Exchange Commission Act, the evidence shows that all of the securities were sold in Texas, and none outside thereof.

The short and simple answer to these claims as to the mail fraud counts is that they are wholly without foundation in law and in fact, for, as we have shown above, the record contains ample evidence to support a verdict find-

ing that there was a scheme to defraud, and that the indictment letters were mailed in connection with the furtherance of the plan to promote the enterprise by selling stock in it.

As to the charges under the Securities Act, there is uncontradicted evidence that sales were made to at least one or more persons residing outside of the state. Besides, under U.S.C., Sec. 77(e) (a)(1) and (2), the use of the mails in connection with the sale of a non-registered security is in violation of law, and there is no claim that the security was registered.

Finally, if it be conceded that the motion to instruct was good as to counts 6 to 10, as pointed out above this would not require a reversal of the judgment because the sentence imposed was no more than could have been imposed on any one of the mail fraud counts.

Appellant's third specification of error, that the court should have remanded the cause to permit the record to be perfected as to the lost exhibits, is trivial. While this court did deny the remand, it was because the parties had agreed to, and did, cooperate to supply the omissions, which was done by copying the pertinent parts of some of the exhibits from the transcript and by stipulating as to the balance from copies of the exhibits in the possession of the parties or verbatim transcript from the record as to them. Thus every omission was supplied and a record made thereof under a stipulation that this court should

accept the record in lieu of an exact copy of all the exhibits introduced at the trial, the parties stipulating that the exhibits introduced were substantially as set out in the supplemental record they had agreed to.

Specification of error No. 4 having to do with the government's requested charges Nos. 3 and 4, is patently without substance. Rule 30 of the Federal Rules of Criminal Procedure provides in part as follows:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." (emphasis supplied)

Under that rule, in order to put the trial court in error, it is necessary that the defendant precisely state the ground of his objection and that the ground stated point out an error prejudicial to the defendant. Cf. *Popham v. United States*, 11 F (2) 966. The defendant did not do this here. While he did make a specific objection, the objection he made was to matters in the charge which was burdensome on and prejudicial to the government instead of to him.

This is the record. After the court had concluded his charge, defendant's counsel, asked if he had any objections, replied in substance that to the court's main charge connected with the defendant's special charge, he had no exceptions, he thought it was highly satisfactory, but he

did except to the government's requested charges Nos. 3 and 4.

The portion of charge No. 3, which was a long one, objected to was contained in the last paragraph, charging in substance that it was not essential that the government prove that all of the investors in the Atomotor Company were defrauded, "if any you so find, but it is sufficient if you so find that one or more of such investors were defrauded". The only objection made to it was, "We say it is immaterial whether anybody is defrauded or not, and that charge has no application here. It is ambiguous, calculated to mislead the jury, and it is not the law governing the case."

As the government points out in its brief, this objection did not point to any burden imposed upon or prejudice done to the defendant. It points out on the contrary that the charge placed a greater burden on the government than was actually required, since it is not necessary that the government prove that anyone was actually defrauded in order to show a violation of the statutes under which defendant was indicted. *Butler v. U. S.*, 53 F (2) 800.

As to the government's special charge No. 4, while on the record an objection was made to its giving that it was misleading and calculated to mislead the jury, it is not pointed out wherein it did do so, and when it comes to the brief in the case, defendant does not point to any error in charge No. 4. He simply sets the charge out and does not

at all document his claim that it was erroneous. Indeed, he could not, for the charge correctly and with provision states the law.

As to charge No. 3, it does impose a heavier burden on the government than it should bear. In doing so, it does not, and defendant does not and cannot claim that it does, impose on defendant any burden or obligation or in any way increase or affect the difficulties attending his defense. The cases cited by the appellant to the effect that if a charge is erroneous, the Court of Appeals is not at liberty to assume that it did not injuriously affect appellant, have no application here because the instruction complained of here could not under any possible view be assigned by appellant as erroneous.

It is true that on the last page of his brief, appellant undertakes to claim that the charge had or might have had the effect of leading the jury to believe that they must convict the defendant if one or more persons had been defrauded, even though the defendant had no intent to defraud. This, however, cannot avail him, first because he made no such point in the court below, and, further, the objection is not sound, because nothing in charge No. 3 or in the charge as a whole could lead to such a result.

Upon the question of fraudulent intent of the accused, which it was certainly essential for the government to prove, the court gave a full charge which the defendant endorsed and approved in all particulars, and nothing in

the charge now complained of in any manner took away from or in any manner modified these instructions.

No error appearing, the judgment is

AFFIRMED.

APPENDIX C

JUDGMENT

Extract from the Minutes of June 8, 1955.

NO. 15048

WILLIAM ESTEP

VERSUS

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 15048

WILLIAM ESTEP, *Appellant*

VERSUS

UNITED STATES OF AMERICA, *Appellee*

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of ecrtiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days from July 15, 1955; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from July 15, 1955 there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying

the writ, or upon the expiration of thirty days from July 15, 1955, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 25th day of July, 1955.

.....

(Signed) J. C. HUTCHESON, JR.
United States Circuit Judge.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and rules involved	2
Statement	4
Argument	8
Conclusion	11

CITATIONS

Cases:

Burdeau v. *McDowell*, 256 U.S. 465	8
Freeman v. *United States*, 96 F. 2d 13	11
Hirabayashi v. *United States*, 320 U.S. 81	10
Pereira v. *United States*, 347 U.S. 1	9
United States v. *Young*, 232 U.S. 155	9
Wilson v. *United States*, 221 U.S. 361	9

Statutes:

Securities Act of May 27, 1933:	
Section 5(a), 48 Stat. 77, 15 U.S.C. 77e(a) (1952 ed.)	2
Section 17(a), 48 Stat. 84, 15 U.S.C. 77q(a) (1952 ed.)	2-3
18 U.S.C. 1341	3

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 317

WILLIAM ESTEP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. B; R. 885) is reported at 223 F. 2d 19.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. C; R. 885) was entered on June 8, 1955. A rehearing was denied on July 15, 1955 (Pet. App. A). The petition for a writ of certiorari was filed August 12, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the introduction into evidence against petitioner of the books and records of a company he had formed, which were given to the government by a former officer of the company who came into possession of them in his official capacity, violated the Fourth and Fifth Amendments.

2. Whether the evidence showing use of the mails was sufficient to warrant the denial of the motion for acquittal.

3. Whether the court erred in its charge to the jury.

STATUTES AND RULES INVOLVED

Section 5 of the Securities Act of May 27, 1933, 48 Stat. 74, 77, 15 U. S. C. 77e (1925 ed.) provides in pertinent part:

> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.
>
> * * * * *

Section 17 of the Securities Act of May 27, 1933,

48 Stat. 84, 15 U. S. C. 77q (1952 ed.) provides in pertinent part:

> (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

* * * * *

18 U. S. C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be

such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be set or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted upon nine counts of a ten count indictment (R. 1-14). Counts 1-4 charged use of the mails in furtherance of a scheme to defraud; counts 6-8 dealt with violations of the fraud provisions of Section 17 of the Securities Act of 1933 (*supra,* pp. 2-3); counts 9 and 10 concerned violations of the registration provisions of Section 5 of the Securities Act of 1933 (*supra,* p. 2). The court sentenced petitioner generally to five years imprisonment and a fine of $2,000 on the fraud counts, and imposed a general sentence of five years imprisonment on the non-registration counts, to run concurrently with the sentences on the other counts (R. 13). On appeal, the judgment was affirmed (Pet. App. C; R. 885-892).

The scheme to defraud alleged in the indictment and proved at the trial related to the sale of subscriptions of the capital stock of Atomotor Manufacturing Company, Inc., which was represented as being about to market a fuelless self-energizing motor. A number of representations alleged to have been made to induce persons to purchase stock subscriptions (R. 2-5) were established by the testimony of witnesses who had purchased the stock (R. 54-64, 164, 174, 177-182, 215, 218, 226-228, 273, 274, 320-323, 341-346, 372-377, 386-390, 403-409).

The falsity of these representations was proved in various ways. The government showed that qualified engineers had told petitioner that the motor could not possibly work (R. 487, 646), and that a patent attorney had told petitioner that no patent could be obtained thereon (R. 529-535). The government also showed that petitioner had oversold the authorized capital stock of the corporation (R. 808-809, 814-817, 819), and that he used some of the money obtained from the sale of stock, all of which he had said would go to finance the motor, for his own personal use (R. 409-474).

As part of its case, the government proved that petitioner used the mails in furtherance of his scheme to defraud (R. 105, 810-811; R. 110, 812, 813; R. 111, 813; R. 143, 818, 819; R. 148, 820-822; R. 269, 829; R. 302, 831; R. 304, 831, 832; R. 307, 833; R. 319, 834; R. 335, 836; R. 338, 837; R. 350, 839; R. 357, 840, 841; R. 358, 841, 842; R. 492, 862; R. 494, 867; R. 505, 870 and R. 607, 874). The

government also proved that non-registered securities were sent through the mails (R. 307, 833) and their sale solicited through the mails (R. 338, 837).

Petitioner objected to the introduction into evidence of the books and records of the company (R. 132-140). These consisted of the minutes of the meetings and the list of stockholders (R. 140). They were given to the government voluntarily by the company's former secretary who came into possession of them in the course of his duties (R. 141). The secretary could not recall if he received a letter from petitioner requesting the return of the books and records before or after he turned them over to the government (R. 141-142). He had resigned as secretary before turning them over to the government (R. 138).

The trial court overruled motions made by petitioner at the close of the government's case, and again when both sides rested, for a judgment of acquittal on the ground that the evidence was insufficient to warrant a conviction (R. 668, 781).

In charging the jury, the court outlined all elements of the offenses involved in violation of the mail fraud and securities statutes (R. 784-795). Petitioner's counsel stated that the court's main charge was highly satisfactory, but objected to special charges three and four requested by the government (R. 800-804).

Charge three read as follows (R. 17-18):

> It is not essential that the Government show by the required degree of proof that all alleged false and fraudulent representations, pre-

tenses and promises made by the defendant were false or that all of the alleged false representations, pretenses and promises specifically charged in the indictment were in fact made by the defendant. It is enough if the Government establish by the required degree of proof that the defendant devised a scheme or artifice to defraud and made one false representation or promise or omitted to state one material fact which you may find necessary to have been disclosed in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and all in furtherance of the scheme to defraud.

You are further charged that it is not essential that the Government show by the required degree of proof that all the investors in the capital stock of Atomotor Manufacturing Company, Inc. were defrauded, if any you so find, but it is sufficient if you so find that any one or more of such investors were defrauded.

Petitioner objected to this charge on the ground that it was immaterial whether anyone was defrauded—stating that the charge would therefore be misleading (R. 800-801).

Charge four read as follows (R. 18-19):

False representations, if any, can not be justified by a belief that profits will eventually be realized by persons induced to purchase stock. No amount of honest belief that a corporate enterprise will ultimately make money

for stockholders will excuse false representations or concealment of material facts to obtain money for such enterprise.

Petitioner objected that this was "calculated to mislead the Jury into the belief that if Estep did not believe they would make big money alone, why, that would be no defense" (R. 802).

ARGUMENT

1. The introduction into evidence of the books and records of the Atomotor Manufacturing Company, Inc., did not violate the constitutional directions against unreasonable search and seizure and compulsory self-incrimination. For the books did not belong to petitioner, they were not in his possession, and they were not kept by him. Nor was a search and seizure involved.

(a). The record clearly shows that the books and records were given to the government voluntarily by a former company official who had come into possession of them in his official capacity. Whether or not he should have turned them over to the company upon his resignation is immaterial in this case. Property stolen by a private person and turned over to the government was held admissible in *Burdeau* v. *McDowell*, 256 U. S. 465, 475. *A fortiori*, admission into evidence of property given to the government by one in possession of it does not violate the Fourth Amendment. In an effort to link the government with the company officer's retention of the records, petitioner refers to him as an "agent" of the government (Pet. 19) and of the

prosecution (Pet. 20). But agency is not established by the mere fact that the secretary turned the evidence over to the government and became a witness for the prosecution. His acts in retaining the property were not caused by the government and no government agent participated therein.

(b). Since the records were corporate books, no issue of self-incrimination is presented. *Wilson* v. *United States,* 221 U. S. 361, 385.

2. There was ample evidence before the jury to warrant denial of the motion for acquittal.

Petitioner argues that, since much of the stock was sold directly at meetings, the use of the mails was merely incidental to the operation of the corporation (Pet. 21). However, it is well established that the use of the mails in a scheme to defraud need not be an essential element of the scheme. *Pereira* v. *United States,* 347 U. S. 1, 8. It is sufficient under the mail fraud statute that the mails were in fact used in furtherance of the scheme. *United States* v. *Young,* 232 U. S. 155.

Moreover, there was much evidence to show that use of the mails was an important part of the scheme to defraud. The government introduced various letters written by petitioner and sent through the mails which contained claims that the Atomotor was working well and was a great success (R. 107, 338, 359, 818, 831); that a patent had been arranged (R. 813); that a large bank was backing him (R. 813); that a fine offer from a Dallas firm had been received to make and market the engines (R. 820). Other letters expressed hope that more

stock could be sold (R. 107), sought help in selling shares (R. 354, 875), and announced stockholder's meetings (R. 812, 269, 319).[1]

Since conviction on any one of the counts will support the general sentence imposed (*Hirabayashi* v. *United States,* 320 U. S. 81, 85), we need not discuss in detail the evidence as to each count. It is enough to point out that evidence of stock certificates mailed (R. 307) and a solicitation by letter of help in selling shares in the Atomotor Company (R. 875) supports counts 9 and 10 for using the mails to sell or deliver non-registered securities. There was no claim that the securities were registered.

3. The error which petitioner now finds in the giving of charges 3 and 4 is that they amounted to a withdrawal of the correct charge already given and led the jury to believe that, regardless of petitioner's intent, if they found that any of the stockholders had lost money in this venture it was their duty to convict (Pet. 17). A mere reading of these charges establishes that they are not subject to such an interpretation. The second paragraph of charge 3, indicating that the jury must find that at least one investor was defrauded, may have been prejudicial to the government, since there was no need to prove that anyone was actually defrauded, but under no circumstance could the instruction have been viewed by the jury as requiring conviction merely if someone lost money. To "defraud"

[1]Among the letters on which particular counts were based were letters of these types (R. 818, 338, 831, 354).

does not and cannot mean to cause someone to lose money. Moreover, the court in its main charge had fully discussed the necessity for a finding of intent (R. 790-791).

Cases cited by petitioner in support of his contention (Pet. 18-19) state broad and general propositions of the law as to jury charges, based upon different factual circumstances and, with the exception of *Freeman* v. *United States,* 96 F. 2d 13 (C. A. 5), upon different statutes. In the *Freeman* case, involving the mail fraud statute, the court stated that the instructions must be read as a whole and refused to read an inconsistency into the charge. 96 F. 2d at 14. That is the situation here.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

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SEPTEMBER, 1955.

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